Long Lake Energy Corporation, Docket No. EL90-4-000

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Long Lake Energy Corporation, Docket No. EL90-4-000

Order Granting in Part and Denying in Part Petition for Declaratory Order

(Issued June 1, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On November 6, 1989, Long Lake Energy Corporation (Long Lake or Petitioner) filed a petition for declaratory order requesting that the Commission clarify that Long Lake's present ownership interest in Commonwealth Atlantic Limited Partnership (Commonwealth) [1] will not affect the status, under the Public Utility Regulatory Policies Act of 1978 (PURPA), of qualifying facilities (QFs) that Long Lake owns. In addition, Long Lake requests that the Commission determine that ownership of Commonwealth [2] does not trigger section 292.206(b) of the Commission's regulations, [3] with respect to Long Lake and any other persons.

Notice of Long Lake's filing was published in the *Federal Register*, with comments, protests, or interventions due on or before December 6, 1989. [4] On December 15, 1989, Diamond Energy, Inc. (Diamond), Ultrasystems Development

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Corporation (Ultrasystems), and Catalyst Energy Corporation (Catalyst) moved to intervene. Diamond supports the position and arguments made by Long Lake and urges the Commission to grant the relief requested. Ultrasystems raises no substantive issues. Catalyst requests that the Commission affirm that Long Lake's ownership interest in an independent power producer (IPP) facility, i.e., the Commonwealth facility, through its subsidiary, does not affect the status, under PURPA, of QFs owned by its other subsidiaries. Catalyst also raises two questions: (1) whether an entity that is neither an electric utility nor an electric utility holding company nor a wholly or partially owned subsidiary of either may own more than 50 percent of the equity interest in a QF; and (2) whether the Commission may exercise jurisdiction over an entity prior to the date on which the entity has begun to sell electricity at wholesale in interstate commerce. Catalyst supports its request with detailed legal arguments similar to those of Long Lake.

This case presents the Commission with the opportunity to clarify the parameters of its QF ownership requirements. While we do not address every conceivable ownership structure, we find, as discussed below, that: (1) only the entity that sells electric energy is an "electric utility" under section 3(22) of the Federal Power Act (FPA); and (2) in certain limited circumstances, electric utilities or electric utility holding companies can own in excess of 50 percent of the equity interest in QFs.

Background

Long Lake is an established energy developer that owns and operates several QFs, located primarily in New York, and is not owned by or affiliated with any franchised public utility. Long Lake seeks clarification of the Commission's regulations at this time to provide assurances that the status of its QFs will be unaffected by its interest in Commonwealth. [5] In addition, Long Lake seeks a determination that its interest, and the interest of any entity in Commonwealth, "will not trigger the primarily engaged test [for utility ownership in QFs as implemented] in 18 C.F.R. §292.206(b)." [6]

Long Lake's requests turn on certain definitions contained in the FPA, PURPA, and the Public Utility Holding Company Act (PUHCA). The terms "public utility" and "electric utility" are often used interchangeably. However, they have different definitions in the FPA, and there is also a definition of "electric utility company" in PUHCA. As discussed below, the PUHCA definition is relevant to the question of whether a cogeneration or small power production facility satisfies the ownership requirements for qualifying facility status under PURPA.

Section 201(e) of the FPA defines public utility as ". . . any person who owns or operates facilities subject to the jurisdiction

of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of [FPA] sections 210, 211, or 212)." 16 U.S.C. §824(e) (1988). Section 3(22) of the FPA, as amended by section 201 of PURPA, 16 U.S.C. §796(22) (1988), defines electric utility as ". . . any person or State Agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal Power marketing agency."

Though electric utility is not referred to in the FPA definitions of qualifying small power production facility and qualifying cogeneration facility, [7] the definition of electric utility set forth in section 3(22) of the FPA is used in section 292.206 of the Commission's regulations [8] implementing the ownership requirements for qualifying small power production facilities and qualifying cogeneration facilities. Specifically, section 292.206(b) provides that not more than 50 percent of the equity interest of a QF can be owned by an electric utility or utilities (as defined in FPA section 3(22)), or an electric utility holding company or companies (as defined in 18 C.F.R. §292.202(n) (1989)) or any combination thereof. [9]

The matter is somewhat more complicated, however, in that section 292.202(n) of the Commission's regulations defines "electric utility holding company" by reference to section

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2(a)(7) of the PUHCA. [10] PUHCA section 2(a)(7), in turn, references the definition of "public-utility company" in PUHCA section 2(a)(5) [11] which, in turn, references the PUHCA section 2(a)(3) definition of "electric utility company." PUHCA section 2(a)(3) defines electric utility company as ". . . any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale, ... [12]

Thus, to fully understand the Commission's ownership requirements in 18 C.F.R. §292.206(b) one must refer to the FPA section 3(22) definition of electric utility as well as the PUHCA section 2(a)(3) definition of electric utility company. *See* 18 C.F.R. §292.101(a) (1989).

Long Lake makes two arguments in support of its request for clarification of the Commission's regulations and their effect on the status of its QFs. First, Long Lake argues that the qualifying status of its QFs is not jeopardized, *at this time*, because Long Lake is not an electric utility. [13] Citing the Commission's decision in *Ocean State Power*, [14] Long Lake argues that the fact that Commonwealth may be a public utility (under section 201 of the FPA) does not mean that Commonwealth is *today* an electric utility as defined in FPA section 3(22) because the facility is not currently selling electric energy. Moreover, even when Commonwealth becomes an electric utility under that section of the FPA, the Petitioner asserts that Long Lake will not become an electric utility since Commonwealth, not Long Lake, will be the person selling the electric energy.

Second, Long Lake argues that it also will not be considered an electric utility holding company under the Commission's QF regulations. Long Lake indicates that it intends to seek a no-action letter from the staff of the Securities and Exchange Commission (SEC) to the effect that Long Lake's interest in Commonwealth will not result in it being defined as a holding company under PUHCA. Long Lake contends that when, as expected, it receives such a no-action letter, it follows that it will not be an electric utility holding company under the Commission's QF regulations. [15]

Long Lake indicates that its request for a no-action letter will be premised upon its intended structuring of its ownership in Commonwealth so that Long Lake will not be a holding company under PUHCA when the Commonwealth facility generates and sells electric energy. Long Lake submits that if the SEC staff finds that Long Lake is not a holding company under PUHCA, the Commission should accept the SEC staff's determination and find that Long Lake is not an electric utility holding company under the Commission's QF regulations. [16] In that regard, Long Lake argues that since section 292.202(n) of the Commission's regulations implementing PURPA [17] defines electric utility holding company by citing and relying on section 2(a)(7) of PUHCA, there is no reason for the Commission to independently determine whether Long Lake is a holding company, since the agency which has primary responsibility for administering PUHCA, the SEC, will have certified that Long Lake is not a holding company. [18]

In support of its request that the Commission's "primarily engaged" test not be triggered, Long Lake argues that Commonwealth is not the type of traditional utility that was intended to trigger the test. Long Lake requests that the Commission therefore determine that Long Lake and all owners of Commonwealth do not become "electric utility holding companies" solely through their ownership of Commonwealth at the time that Commonwealth sells electric energy.

Long Lake also asserts that the Commission can waive application of the primarily engaged test for good cause and should do so here. Long Lake contends that the primarily engaged test was not designed to prevent ownership of nontraditional generators,

i.e., those without either a franchise or market power, by entities that also own QFs. Acknowledging that this is a question of first impression, Long Lake asserts that when Congress enacted PURPA in 1978, nontraditional generating companies that generated and sold electricity exclusively to a franchised public utility were uncommon and therefore it is highly unlikely that Congress intended the primarily engaged test to be applicable to owners of these facilities. [19] In

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addition, Long Lake argues that application of the primarily engaged test to Commonwealth would force Long Lake to choose between developing QFs or nontraditional generating facilities.

Discussion

Under Rule 214(d) of the Commission's Rules of Practice and Procedure, [20] we find that good cause exists to grant the untimely, unopposed motions to intervene of Diamond, Ultrasystems and Catalyst, given the interests of the constituencies they represent, the early stage of the proceeding, and the absence of undue prejudice or delay.

In sections 3(17)(C)(ii) and 3(18)(B)(ii), Congress provided, *inter alia*, that a qualifying facility is a facility:

> . . .which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities.

16 U.S.C. §§ 796 (17) (C) (ii) and (18) (B) (ii) (1988). To implement this requirement, the Commission in Order No. 70, [*FERC Statutes and Regulations Preambles 1977-1981* ¶30,160], promulgated section 292.206 of its regulations.

Section 292.206(a) essentially repeats the statutory language. Section 292.206(b) provides:

> A cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility, or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's interest shall be considered as ownership by an electric utility or electric utility holding company. 18 C.F.R, §292.206(b) (1989).

A. *The Definition of Electric Utility*

We will grant Long Lake's request that we find its ownership in Commonwealth does not, *at this time*, jeapordize the qualifying status of Long Lake's QF's. When the Commission accepts Commonwealth's rates for filing, Commonwealth will become a public utility. [21] However, Commonwealth will not become an electric utility under FPA section 3(22) until it sells electric energy, and it will not become an electric utility company under PUHCA section 2(a)(3) until its facilities are used for the generation, transmission, or distribution of electric energy for sale. Since these events have not yet transpired, Long Lake's ownership in Commonwealth does not affect at this time the qualifying status of Long Lake's QFs.

We also agree with Long Lake that while Commonwealth will become an electric utility under FPA section 3(22) when it sells electric energy, that does not mean that Long Lake, Mission Energy Company or any other owner of Commonwealth, will become an electric utility by virtue of Commonwealth's sale of electric energy. As described below, none of those entities will be the "person" engaging in the sale.

The term "person" is defined in section 3(4) of the FPA as ". . . an individual or a corporation." [22] "Corporation" is defined in section 3(3) of the FPA as ". . . any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing." [23] However, the definition of "corporation" (including partnership) does not reach upstream to parents, nor does it reach subsidiaries or affiliates. It is limited to the subject entity, in this instance Commonwealth.

Under the parallel provision the Natural Gas Act (NGA), [24] the Commission has held that utility status does not attach to parents, subsidiaries, or affiliates of an entity. *Sunshine Mining Company*, 36 FERC ¶61,186 (1986). Sunshine sought a declaratory order that it was not a "natural gas company" within the meaning of section 2(6) of the NGA [25] because it did not engage in either the transportation of natural gas in interstate commerce or the sale for resale of natural gas in interstate commerce and because its corporate identity was separate from that of its natural gas company subsidiaries. The Commission

agreed with Sunshine that it "[did] not become a 'natural gas company' subject to Commission jurisdiction through the activities of its subsidiaries," and held that "[i]t is Sunshine's wholly owned subsidiaries,

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operating as separate and distinct corporate entities engaged in the sale and transportation of natural gas in interstate commerce, which come within the definition of section 2(6) of the NGA." [26] Thus, only the corporation, or in this instance the partnership, that actually sells electric energy is the "person" that "sells electric energy," and therefore is the electric utility. Accordingly, upon the sale of electric energy, Commonwealth will become an electric utility, while its owners, including Long Lake, will not become electric utilities by virtue of the Commonwealth sale.

We also clarify, however, that we will continue to examine upstream companies in determining whether the PURPA ownership requirements have been satisfied. Specifically, in looking upstream for this purpose, we are not looking to see if parents of an entity that meets the FPA section 3(22) definition of an electric utility are themselves electric utilities. Rather, our examination is designed to determine if parents of entities holding interests in a QF are electric utility holding companies as defined in 18 C.F.R. §292.202(n). [27]

B. *Electric Utility/Electric Utility Holding Company Under the Commission's QF Ownership Regulations*

Long Lake asks the Commission to find that, if the SEC staff issues a no-action letter in response to Long Lake's request that it not be defined as a holding company under section 2(a)(7) of PUHCA, Long Lake will not be an electric utility holding company under the Commission's regulations and will therefore not be disqualified from owning in excess of 50 percent of the equity interests of QFs under the "primarily engaged" test in section 292.206(b) of the Commission's regulations. [28] Catalyst argues in support of Long Lake's request that the Commission has adopted rules which unequivocally "establish that Long Lake's interest, through its subsidiary, in an IPP [facility] does not affect the qualifying status of QFs owned by its other subsidiaries." [29]

As noted, PUHCA section 2(a)(3) defines electric utility company as ". . . any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale . . . ." However, PUHCA section 2(a)(3) also provides that the SEC, upon application, may by order declare a company operating such facilities [generation, transmission or distribution] not to be an electric utility company if certain conditions are met (*see* PUHCA sections 2(a)(3)(A) and (B)). It also provides that the filing of such an application in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of PUHCA section 2(a)(3) until the SEC acts on such application.

Because the filing of such a section 2(a)(3) application with the SEC would, until the SEC acts, exempt Commonwealth from the definition of electric utility company, it would also exempt Commonwealth from the PUHCA section 2(a)(5) definition of public-utility company. This, in turn, would mean that Long Lake and the other owners of Commonwealth could not meet the definition in PUHCA section 2(a)(7) of a holding company. Therefore, until the SEC acted on the application, the owners could not be electric utility holding companies under our QF regulations.

It is also possible under the SEC's regulations that even if Commonwealth meets the PUHCA section 2(a)(3) definition of electric utility company, Long Lake will not be an electric utility holding company as defined in PUHCA section 2(a)(7), because Long Lake may not, at that time:

> . . . directly or indirectly own[ ], control[ ], or hold[ ] with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause B [PUHCA section 2(a)(7)(B)] . . . .

15 U.S.C. §796(a)(7) (1988).

Long Lake has not indicated that an application has been or will be filed pursuant to PUHCA section 2(a) (3) to exempt Commonwealth from that section's definition of electric utility company. Likewise, Long Lake has provided no specific information to support a declaration that it would not be a holding company other than a statement of its intention to seek an SEC staff no-action letter to

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that effect. [30] Long Lake has advised only that it will structure its ownership in Commonwealth so that Long Lake would not be

deemed an electric utility holding company, but it has given no indication whatsoever of what form that structure will take. Since the definition of electric utility holding company in our QF regulations relies upon PUHCA section 2(a)(7), we are unable, given this lack of information, to make any determination regarding the holding company issue. Accordingly, we must deny this part of Long Lake's request, without prejudice to its seeking such a determination upon the provision of adequate information. The information necessary to make such a determination will vary depending on how Long Lake structures its ownership in Commonwealth.

A company that normally would fall under the definition of electric utility, for purposes of section 292.206(b) of the Commission's regulations, may be excepted from the definition under certain circumstances. Specifically, section 292.206(c) [31] provides that the electric utility may be excluded from the operation of section 292.206(b) if it is a subsidiary of a holding company exempt under PUHCA sections 3(a)(3) [32] or 3(a)(5). [33] Under these exceptions, a company may own the entire equity interest in a QF if it is a subsidiary of a holding company that is only "incidentally" a holding company or is a subsidiary of a holding company that derives no material part of its income from a public-utility company within the United States. If the Applicant filing an application for QF status relies on these provisions, it may either supply or cite to an SEC order or, as in *Trenton*, an appropriate SEC rule upon which it relies. This will provide the Commission with adequate information to determine whether its QF ownership rule is satisfied under the proposed ownership structure. [34]

Section 292.206(c) also allows the electric utility to be excluded on the ground that it is not an electric utility company pursuant to the operation of PUHCA section 2(a)(3)(A). [35] The submission of or cite to an SEC order or an SEC rule, if applicable, will also provide the Commission with adequate information to determine whether its QF ownership rule is satisfied under the proposed ownership structure.

The above analysis concerns exemptions from the definition of electric utility. There are similar exemptions from the definition of electric utility holding company. Section 292.202(n) defines electric utility holding company as a holding company:

> . . . as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79c(a)(3) or 79c(a)(5).

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18 C.F.R. §292.202(n) (1989). Thus, electric utility holding companies exempt by SEC rule or order under PUHCA sections 3(a) (3) or 3(a) (5) can own 100 percent of the equity interest in a qualifying facility.

There are other ways in which a holding company can own in excess of 50 percent of the equity interest in a QF. Section 292.202(n), as noted above, defines electric utility holding company as a holding company owning one or more electric utilities, as defined in PUHCA section 2(a) (3). Accordingly, if a company is not an electric utility company under PUHCA 2(a) (3), its parent will not be an electric utility holding company under our QF regulations.

PUHCA section 2(a) (3) allows the SEC, upon application, to declare that a company operating facilities used for generation, transmission or distribution of electric energy for sale not to be an electric utility company in two instances. First, if

> ...such company is primarily engaged in one or more businesses other than an electric utility company, and by reason of the small amount of electric energy sold by such company....

it is unecessary for such company to be considered an electric utility company under PUHCA. Second, if

> ...such company is one operating within a single State, and substantially all of its outstanding securities are owned...by another company to which such operating company sells or furnishes electric energy which it generates; such other company uses and does not resell such electric energy, is engaged primarily in manufacturing (other than the manufacturing of electric energy or gas) and is not controlled by any other company....

Moreover, PUHCA section 2(a) (3) provides that the filing of an application for such exemptions, in good faith, exempts such company (and the owner of the facilities operated by such company) from the section until the SEC acts on the application. In addition, as in the case with the PUHCA section 3 (a) (5) exemption, [36] SEC Rule 7, 17 C.F.R. §250.7 (1989), provides for automatic exemption, under PUHCA section 2(a)(3), for electric utility companies meeting certain requirements.

Accordingly, if SEC Rule 7 is applicable or if such an application is filed with the SEC, a holding company could own in excess of 50 percent of the equity interest in a QF until the SEC rules unfavorably on the application. The submission of either a citation to SEC Rule 7, the application (if the SEC has not acted) or a favorable SEC order would allow the Commission to act on the QF application.

Finally, similar to the provisions of PUHCA section 2(a)(3), a company could be found not to be an electric utility holding company under PUHCA section 2(a)(7) by virtue of an SEC order finding that its interest in the voting securities and control of an electric utility company (as defined in section 2(a)(3)) are at or below the stated limits in that section. [37] Section 2(a)(7) operates in a similar fashion as section 2(a)(3) with respect to the filing of applications. Thus,the information requirements for a company seeking to use this provision is the same as noted above concerning PUHCA section 2(a)(3).

These examples are not exhaustive of the possibilities. They are provided as a guide to the principal possibilities and, as noted, to identify the type of evidence necessary for a Commission finding that the QF ownership rules have not been or will not be violated.

C. *IPPs*

Finally, Long Lake asks the Commission to declare that Commonwealth is not the type of traditional utility that triggers the primarily engaged test of section 292.206(b) of our regulations. Long Lake contends that the provisions of the FPA would prevent Long Lake from continuing to hold a controlling interest in Commonwealth after the facility is constructed and selling power, although Long Lake asserts that if PUHCA were amended, it would be free to do so under PUHCA. [38]

There are two responses to Long Lake's request. First, we will not speculate on what may happen in the event amendments to the FPA, PUHCA or PURPA are subsequently enacted. [39] Second, we disagree with Long Lake's assertion that IPPs, or nontraditional utility generators, were intended to be exempt from the primarily engaged test of FPA sections

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3(17) and 3(18). Section 201 of PURPA amended the FPA by adding those sections, which require, in sections 3(17)(C)(ii) and 3(18)(B)(ii), that a qualifying facility be:

> . . . owned by a person not primarily engaged in the generation or sale of electric power (other than electric power *solely* from cogeneration or small power production facilities); (emphasis added).

Thus, since Commonwealth will sell electric energy to Virginia Power and since Commonwealth's generating facility is neither a small power production facility nor a cogeneration facility, as those terms are defined in FPA sections 3(17)(A) and 3(18)(B), respectively, we must deny Long Lake's final request. [40]

The Commission orders:

(A) The untimely motions to intervene of Diamond, Ultrasystems, and Catalyst are hereby granted.

(B) Long Lake's request for a declaratory order is hereby granted in part and denied in part as discussed in the body of this order.

-- Footnotes --

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[1] Commonwealth intends to construct a 240 MW electric generating facility. The unit is expected to be in service by March 1992. Commonwealth intends to sell power from the unit to Virginia Electric Power Company (Virginia Power).

The Commission, in Docket No. ER90-24-000, is considering Commonwealth's proposed rate for sales from the unit to Virginia Power.

[2] Long Lake owns 100 percent of Long Lake Power Corporation (Long Lake Power). Long Lake Power owns 50 percent of Chickahominy River Energy Limited Partnership, which owns James River Energy Corporation (JREC) and Chickahominy River Energy Corporation (CREC). JREC and CREC own Commonwealth. The other 50 percent of Chickahominy River

Energy Limited Partnership is owned by Hanover Energy Company, a wholly owned subsidiary of Mission Energy Company, which, in turn, is a subsidiary of the Mission Group. The Mission Group is a wholly owned subsidiary of SCEcorp, an electric utility holding company which also owns Southern California Edison Company, an electric utility.

[3] 18 C.F.R. §292.206(b) (1989).

[4] 54 Fed. Reg. 48,798 (1989).

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[5] Long Lake Petition at 4.

[6] Id.

[7] 16 U.S.C. §§796(17)(C)(ii) and 796(18)(B)(ii) (1988).

[8] 18 C.F.R. §292.206 (1989).

[9] *See* 18 C.F.R. §292.206(b) (1989); *see also* Staff Paper Discussing Commission Responsibilities to Establish Rules Regarding Rates and Exemptions for Qualifying Cogeneration and Small Power Production Facilities Pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978, Docket No. RM79-55, 44 Fed. Reg. 38,863, 38,864 n.2 (July 3, 1979) (Staff Paper); Proposed Regulations Providing for Qualification of Small Power Production and Cogeneration Facilities under section 201 of the Public Utility Regulatory Policies Act, Docket No. RM79-54, *FERC Statutes and Regulations, Proposed Regulations 1977-1981*, ¶32,028, at p. 32,329 n.3, 44 Fed. Reg. 38,872 (July 3, 1979) (NOPR); Small Power Production and Cogeneration Facilities-Qualifying Status, Docket No. RM79-54, *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶30,134, at p. 30,932, 45 Fed. Reg. 17,959 (March 20, 1980) (Order No. 70).

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[10] 15 U.S.C. §79 b(a)(7) (1988).

[11] 15 U.S.C. §79 b(a)(5) (1988).

[12] 15 U.S.C. §79 b(a)(3) (1988).

[13] Long Lake Petition at 5.

[14] 38 FERC ¶61,140 (1987). In *Ocean State Power*, the Commission found that an entity owned "facilities subject to the Commission's jurisdiction" within the meaning of FPA section 201 as soon as the Commission accepted its rates for filing. Accordingly, Commonwealth will be a public utility when the Commission accepts its rates for filing. *But see Ocean State Power*, 43 FERC ¶61,466, at p. 62,139 and n.7, *citing Alamito Company Shareholder v. Alamito Company*, 38 FERC ¶61,241, at p. 61,779 (1987).

[15] Long Lake Petition at 9, 10.

[16] *Id.* at 11.

[17] 18 C.F.R. §292.202(n) (1989).

[18] Long Lake Petition at 11.

[19] *Id.* at 12.

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[20] 18 C.F.R. §385.214(d) (1989).

[21] *See Ocean State Power*, 38 FERC at p. 61,378.

[22] 16 U.S.C. §796(4) (1988).

[23] 16 U.S.C. §796(3) (1988).

[24] Parallel provisions of the FPA and the Natural Gas Act should be interpreted in the same manner. *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Gulf States Utilities v. Alabama Power Co.*, 824 F.2d 1465, 1470 n.5 (5th Cir. 1987).

[25] 15 U.S.C. §717(a)(6) (1988).

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[26] 36 FERC at p. 61,476. *Cf. Central Illinois Public Service Company*, 42 FERC ¶61,073 (1988) (where an applicant sought disclaimer of Commission jurisdiction over the disposition of jurisdictional facilities in the creation of a holding company, the Commission held that different persons were involved, and the applicant and the holding company were two separate corporate entities, each regulated by a different agency); *Savannah Electric and Power Company*, 42 FERC ¶61,240 (1988) (an operating electric utility is subject to Commission jurisdiction while its "separate" and "different" holding company parent is not).

[27] *See*, *e.g.*, *Dominion Resources, Inc.*, 43 FERC ¶61,079 (1988).

[28] Long Lake Petition at 8-10.

[29] Catalyst Motion to Intervene at 12.

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[30] We note that, while the Commission has found no-action letters from the SEC staff may be used to corroborate other evidence concerning whether an entity is an electric utility holding company under our QF regulations, such letters are not dispositive of this question. *Trenton District Energy Company*, 42 FERC ¶61,134 (1988).

[31] 18 C.F.R. §292.206(c)(1989). Section 292.206(c) provides that a company shall not be considered to be an electric utility if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79c(a)(3), 79c(a)(5); or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79b(a)(3)(A).

[32] 15 U.S.C. §79c(a)(3) (1988). PUHCA section 3(a)(3) generally provides for exemption from the provisions of PUHCA where the holding company is only incidentally a holding company, being primarily engaged in nonutility businesses, i.e., an incidental holding company.

[33] 15 U.S.C. §79c(a)(5) (1988). PUHCA section 3(a)(5) generally provides for exemption from the provisions of PUHCA where the holding company derives no material part of its income from a public-utility company, within the United States. SEC Rule 5, 17 C.F.R. §250.5 (1989), provides for automatic exemption, under PUHCA section 3(a)(5), for holding companies meeting certain requirements.

[34] We note that if the Applicant relies on SEC Rule 5, the Applicant could own 100-percent of the equity interest in a QF,

unless the SEC subsequently terminates the exemption pursuant to SEC Rule 6. *See* 17 C.F.R. §250.6 (1989).

[35] 15 U.S.C. §79b(a)(3)(A) (1988). PUHCA section 2(a)(3)(A) concerns electric utility companies that are primarily engaged in one or more businesses other than the business of an electric utility company. We note that this exemption, 18 C.F.R. §292.206(c)(2) (1989), applies to entities who would be electric utilities under a strict interpretation of section 3(22) of the FPA, but who are excluded from the PUHCA definition by a "primarily engaged" test closely paralleling the "primarily engaged" test of FPA sections 3(17)(C)(ii) and 3(18)(B)(ii). *See* Order No. 70-D, Docket No. RM79-54, Order Amending Regulations, *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶30,234; 46 Fed. Reg. 11,251 (February 6, 1981).

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[36] *See* n. 33 *supra.*

[37] I.e., less than 10 percent of the voting securities.

[38] Long Lake Petition at 11.

[39] In July and November, 1989, two bills were introduced in the Senate and the House, respectively, that would encourage competitive wholesale generation of electricity by exempting certain producers of wholesale electricity from the relevant provisions of PUHCA and the FPA. Congress has held hearings on the Senate bill. Both bills would exempt "exempt wholesale generators" from the definition of "electric utility company" in section 2(a)(3) of PUHCA and would exempt owners of "exempt wholesale generators" from being considered as being primarily engaged in the generation or sale of electric power within the meaning of sections 3(17)(C)(ii) and 3(18)(B)(ii) of the FPA. S. 406, Amendment No. 267, "Competitive Wholesale Generation Act of 1989," and H.R. 3692, "Competitive Wholesale Electric Generation Act," respectively.

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[40] Long Lake's argument that application of the primarily engaged test to Commonwealth would force Long Lake to choose between developing QFs or IPPs is not a matter for the Commission. *See* n. 39 *supra.* Finally, given the clear directives in the statute, we cannot grant waiver of the primarily engaged test in FPA sections 3(17)(C)(ii) and 3(18)(B)(ii). *cf. Pinellas County, Florida*, 50 FERC ¶61,269, at p. 61,857 (1990). (Concerning waiver of the "same site" requirement for small power production facilities in FPA section 3(17)(A)(ii), 16 U.S.C. §3(17)(A)(ii) (1988)).